Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 74-3212

The Stanford Daily, Felicity A. Barringer, Fred Mann, Edward H. Kohn, Richard Lee Greathouse, Robert Letterman, Hall Daily and Steven G. Ungar,

Plaintiffs-Appellees,

vs.

James Zurcher, individually and as Chief of Police of the City of Palo Alto, County of Santa Clara, State of California, Jimmie Bonander, Paul Deisinger, Donald Martin, and Richard Peardon, all individually and as Police Officers of the City of Palo Alto, County of Santa Clara, State of California, Louis P. Bergna, individually and as District Attorney for the County of Santa Clara, State of California, and Craig Brown, individually and as Deputy District Attorney for the County of Santa Clara, State of California,

Defendants-Appellants.

[February 2, 1977]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and EAST,* District Judge

PER CURIAM:

I

We adopt the opinion of the district court, *Stanford Daily v. Zurcher*, 353 F. Supp. 124 (N.D. Cal. 1972).

II

We reject appellants' contention that the issuing magistrate is the sole proper party defendant. Having lost in the lower court, the appellants raise this issue for the first time upon appeal. In this respect, the argument is at least, untimely. Moreover, we are not persuaded that it has merit. The appellants are proper defendants in a suit to declare that action theretofore performed were illegal and to enjoin them from acting illegally or permitting their subordinates from engaging in such illegal conduct in the future.[1] (*Cf. Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969); *Hernandez v. Noel*, 323 F. Supp. 779, 783 (1970) ("In a number of recent cases seeking damages against police officers under the Civil Rights Act,

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*Honorable William G. East, Senior District Judge for the District of Oregon, sitting by designation.

[1]The threat of future violation in the present case is corroborated the appellants' own pleadings: "the defendants Bergna, in his official capacity, and other persons in his office . . . will participate in the seeking of a search warrant and in the issuance of the same . . . whenever there is reasonable cause to believe that there exists property or things to be seized which consist of any item or constitute any evidence which tends to show a felony has been committed[.]"

it has been held that no liability exists unless it is alleged and proved that the officer was either present at or directed or personally cooperated in the acts relied on for liability . . . . Where injunctive relief is sought, however, no such rigid requirements obtain.").)

III

We also reject appellants' argument that their good faith in securing what turned out to be an invalid warrant insulates them from liability. The appellants rely on the rule that gives public officials a qualified immunity in damage actions under Section 1983 if the officials acted in good faith. Extension of this rule to suits like the present one, seeking injunctive and declaratory relief, has been rejected by the courts. We accept the Fourth Circuit's rationale in *Rowley v. McMillan*, 502 F.2d 1326, 1332 (1974):

> ". . . [T]he immunity rule, whatever its scope, is grounded upon the inhibitory effect of suits for money damages. Manifestly, actions for injunctive relief do not have that effect. The federal defendants have cited no case, and we have found none, which holds that the immunity doctrine insulates a public official or public employee from injunctive relief to prevent what would otherwise be an illegal act on his part."

(*Accord: Hodge v. Hedrick*, 391 F. Supp. 91 (E.D. Va. 1975). See *Wood v. Strickland*, 420 U.S. 308, 315, n.6 (1975); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 609 (D.C. Cir. 1974); *Gouge v. Joint School Dist. No. 1*, 310 F. Supp. 984, 990 (W.D.

Wis. 1970); *Richmond Black Police Officers Ass'n v. City of Richmond,* 386 F. Supp. 151, 154 (E.D. Va. 1974); *Saffron v. Wilson,* ____ F. Supp. ____ (D.D.C. 1975 [slip op'n Jan. 2, 1975, No. 75-79]); *Safeguard Mutual Ins. Co. v. Miller,* 472 F.2d 732, 734 (3d Cir. 1973).)

IV

The district court awarded attorney's fees to the appellees. It applied the then prevailing law permitting such awards based on the private attorney general doctrine, and pursuant to the court's inherent equitable power. (*E.g., Brandenburger v. Thompson* (9th Cir. 1974) 494 F.2d 885.) While the case was pending on appeal, the Supreme Court decided *Alyeska Pipeline Service Co. v. The Wilderness Society* (1975) 421 U.S. 240, which severely restricted the private attorney general doctrine and destroyed the legal foundation for appellees' fee award. While this case was still pending on appeal, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976 (the "Act"), 1976 U.S. Code Cong. & Ad. News, 90 Stat. 2641 (October 19, 1976), which restored pre-*Alyeska* law to "cases arising under our civil rights laws, a category of cases in which attorney's fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska,* and makes our civil rights laws consistent." (Sen. Rep. No. 94-1011, 94th Cong., 2d Sess. 4 (1976), accompanying S. 2278 (hereinafter "Senate Report").) (*See also id.* at p. 4) ("This de-

cision [*Alyeska*] and dictum created anomalous gaps in our civil rights laws whereby awards of fees are, according to *Alyeska,* suddenly unavailable in the most fundamental civil rights cases. For instance . . . fees are allowed in a suit under Title II of the 1964 Civil Rights Act . . . but not in suits under 42 U.S.C. § 1983 redressing violations of the Federal Constitution . . . ."); 122 Cong. Rec. 12163 (daily ed. October 1, 1976) ("This bill restores to the courts authority which they had exercised for years under the private attorneys general concept." (remarks of Rep. Fish).)

We are not left to speculate whether Congress intended the Act to apply to attorney's fee awards in cases like this one. The Act expressly states that it is application to §1983 actions like the present case.[2] And the legislative history is crystalline on the point. The House Report accompanying the House version of the same bill states:

> "In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. *Bradley v. Richmond School Board,* 416 U.S. 696 (1974)." (H.R.Rep. No. 94-1558, 94th Cong., 2d Sess. 4, n.6 (1976).)

(*See also* 122 Cong. Rec. 17052 (daily ed. September 29, 1976) ("This application is necessary to fill the gap created by the Alyeska decision and thus avoid

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[2]The Act provides that it applicable to enforce Section 1979 of the Revised Statutes. That section has been codified in 42 U.S.C. § 1983. (*See* H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4 (1976).)

the inequitable situation of an award of attorneys' fees turning on the date the litigation was commenced." (remarks by Sen. Abourezk)); 122 Cong. Rec. 12155 (daily ed. October 1, 1976) ("[I]t would apply to cases now pending, for the simple reason that if that were not the case, the award of fees would depend on the date that the case is filed. I do not think that is the basis on which a determination is made. To that extent, it is retroactive. Pending cases could receive an award of reasonable fees." (remarks of Rep. Anderson)); *id.* at 12160 (remarks of Rep. Drinan).)

As if this were not enough, the Senate Report cited the award in this very case as an example of the fee awards which it approved and which it intended to authorize in the Act. (Senate Report, *supra,* pp. 4, n.3, 6.)

Under these circumstances, no useful purpose would be served in requiring a remand to the district court to decide the impact of the Act on the fee awarded to the appellees. The attorney's fee awarded by the district court was valid when it was made, and it was revalidated by the Act.[3] (*Cf. Lytle v. Commissioner of Election* (4th Cir. 1976) 541 F.2d 421.)

AFFIRMED.

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[3]The Senate Report, *supra,* notes that the district court's opinion in this case provides the standards by which fees should be awarded under the Act. (*See* Senate Report, p. 6 ("It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of complex Federal litigation . . . . The appropriate standards . . . are correctly applied in such cases as *Stanford Daily v. Zurcher,* 64 F.R.D. 680 (N.D. Cal. 1974) . . . .").)

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 74-3212

The Stanford Daily, et al.,
Plaintiffs-Appellees,
vs.
James Zurcher, et al.,
Defendants-Appellants.

[Filed Mar. 28, 1977]

ORDER

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and EAST,* District Judge

The panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestions for a rehearing en banc.

The full court has been advised of the suggestions for an en banc hearing, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for a rehearing en banc are rejected.

*Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

Appendix C

In the United States District Court
Northern District of California

No. C-71 912 RFP

The Stanford Daily, Felicity A. Barringer, Fred Mann, Edward H. Kohn, Richard Lee Greathouse, Robert Litterman, Hall Daily and Steven G. Ungar,

Plaintiffs,

vs.

James Zurcher, individually and as Chief of Police of the City of Palo Alto, County of Santa Clara, State of California, James Bonander, Paul Deisinger, Donald Martin, and Richard Peardon, all individually and as Police Officers of the City of Palo Alto, County of Santa Clara, State of California, Louis P. Bergna, individually and as District Attorney for the County of Santa Clara, State of California, Craig Brown, individually and as Deputy District Attorney for the County of Santa Clara, State of California, J. Barton Phelps, individually and as Judge of the Municipal Court of the Palo Alto-Mountain View Judicial District, Santa Clara County, State of California,

Defendants.

[Filed Oct. 5, 1972]

MEMORANDUM AND ORDER

This is an action pursuant to 42 U.S.C. § 1983 to declare illegal and unconstitutional a search on April 12, 1971 of the offices of the Stanford Daily, the primary newspaper on the Stanford University campus. In addition to declaratory relief plaintiffs, the Stanford Daily and various members of its staff further pray for an injunction against defendants, various state officials restraining them and anyone acting under their direction

> ". . . from seeking the issuance of, issuing, or executing any warrant to search the office of THE STANFORD DAILY, or in the office or residence of any of its staff members for any photographs, negatives, films, reporters' notes, documents or any other material, whether published or unpublished, taken, received, developed or maintained in the course of efforts to gather news, by any person who is a staff member of THE STANFORD DAILY."

Jurisdiction is founded on 28 U.S.C. § 1343(d).

Defendants, in their answer to the complaint contend that the April 12 search was lawful in all respects. In addition defendants Bergna and Brown, District Attorney and a deputy district attorney for Santa Clara County, respectively state as follows:

> ". . . defendant Bergna, in his official capacity, and other persons in his office, including defendant Brown, in their official capacity, and that defendant [magistrate] in his official capacity, will participate in the seeking of a search warrant and in the issuance of the same, in good

> faith and in accordance with the applicable provisions of the laws of the State of California, whenever there is reasonable cause to believe that there exists property or things to be seized which consist of any item or constitute any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony; . . ."
>
> (Paragraph 9 of Answer for defendants Phelps, Bergna, and Brown).

The plaintiffs have moved for summary judment requesting the relief prayed for in the complaint. For purposes of that motion presently before the Court the facts are not in dispute.[1]

On Friday, April 9, 1971, members of the Palo Alto Police Department, as well as the Santa Clara County Sheriff's Department, were called to the Stanford University Hospital to remove a large group of demonstrators. After several futile attempts to have the demonstrators leave peacefully, the police forced their way through the barricaded offices held by the demonstrators. While many of the police entered through a set of doors on the *west* side, the demonstrators apparently charged nine officers stationed on the *east* side. All nine officers were injured, some seriously, and the hospital area was severely damaged. Some furniture and partitions were destroyed, and telephones were ripped out of the walls.

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[1]Through stipulation of the parties this motion for summary judgment does not include the defendant Municipal Judge.

Most of the photographers, reporters, and bystanders were located at the *west* end, so that only two of the demonstrators who assaulted the police could be identified.

On Sunday, April 11, 1971, photographs appeared in a special edition of the Stanford Daily, which indicated that photographers connected with the Daily had been at the east end of the hospital during the incident in question.

On Monday, April 12, 1971, based upon the affidavit of Officer Richard Peardon of the Palo Alto Police Department, Deputy District Attorney Craig Brown of the Santa Clara County District Attorney's office, obtained a warrant to "make immediate search" of the premises of the Stanford Daily for:

> 1) Negatives of films taken at Stanford University Hospital on the evening of April 9, 1971, showing the Sit-In at the Hospital and following events.
>
> 2) The film used while taking pictures at Stanford University Hospital on April 9, 1971, showing the Sit-In and following events.
>
> 3) Any pictures which display the events and occurrences at Stanford Unversity Hospital on the evening of April 9, 1971.

(Exhibit A of the complaint). Defendants have submitted no affidavits, nor have they asserted, that any member of the Stanford Daily was suspected of any unlawful participation in the April 9th incident.

The search warrant was executed at approximately 5:45 P.M. that same day by four members of the

Palo Alto Police Department. (A member of the Stanford University Police Force accompanied them but did not participate in the search). Three of the officers conducted the search, which lasted approximately fifteen minutes.

The search was quite thorough. The officers examined filing cabinets, baskets, and unlocked desk drawers, in executing the warrant. (See affidavits of Officers Deisinger, Martin, and Bonander). According to the plaintiffs' affidavits the desks contained, and the officers were in a position to see notes taken by reporters in the course of interviews which contained information given in confidence and on the understanding that the name of the source would not be disclosed. (See affidavit of Fred Mann at paragraph 25; affidavit of Don Tollefson at paragraph 6.) The plaintiffs assert that the officers saw, scanned or read business and personal correspondence of the *Daily* and members of its staff. (See p. 2 of plaintiff's brief.) The defendants say that even though the photographs were mixed among various notes and letters, they did not read or even scan the materials. As far as the materials described in the search warrant were concerned, the officers apparently found only the photographs that had been published on April 11th, and no materials were removed from the offices.

It should also be pointed out that a check of the Santa Clara County Clerk's records shows that the Santa Clara County Grand Jury—a body before which a subpoena duces tecum is returnable—met on

Monday, April 12, 1971, at *7:30* P.M., two hours after the warrant executed. (Actually, the records reveal that the Grand Jury met at 6:00 o'clock P.M. to discuss administrative matters.)

The basic question in this case is whether third parties—those not suspected of a crime—are entitled to the same, if not greater, protection under the Fourth Amendment than those suspected of a crime. More specifically, are law enforcement agencies required to explore the subpoena duces tecum alternative before obtaining a search warrant against third parties for materials in their possession? For the reasons set forth below the Court holds that third parties are entitled to greater protection, particularly when First Amendment interests are involved. It is the Court's belief that unless the Magistrate has before him a sworn affidavit establishing proper cause to believe that the materials in question will be destroyed, or that a subpoena duces tecum is otherwise "impractical", a search of a third party for materials in his possession is unreasonable per se, and therefor violative of the Fourth Amendment.

I

At the outset, it should be noted that very few cases discuss Fourth Amendment protection of third parties, as distinguished from known suspects, and neither the Court nor the parties have come across any case which discusses the problem of when law enforcement agencies must use a subpoena duces tecum rather than a search warrant. Discussion of

third party searches in the case law is confined almost exclusively to the problem of standing to challenge the legality of the search. See, *e.g., Alderman v. United States,* 394 U.S. 164 (1969). To be sure, searches and seizures against third parties have taken place, but their relative infrequency is perhaps best reflected in the paucity of cases wherein the third party has himself challenged the search. One can offer several explanations as to why there are no cases directly on point here, but no doubt the basic reason is that investigative agencies of government have utilized the subpoena duces tecum to achieve the same end: the examination of certain materials.

On the Fourth Amendment rights of third parties generally, plaintiffs cite three cases dealing with *warrantless* searches of third parties; *Newberry v. Carpenter,* 107 Mich. 567, 65 N.W. 530 (1895); *Owens v. Way,* 82 S.E. 132 (Ga. Sup. Crt. 1914); *Commodity Mfg. Co. v. Moore,* 198 N.Y.S. 45 (1923). Although *Newberry* could be read to permit a third party search with a warrant, *Owens* and *Commodity* both indicate that a search of a third party even with a warrant will not satisfy the requirements of the Fourth Amendment. In *Owens v. Way,* the police arrested one Edwards for the illegal sale of intoxicating liquors, and simultaneously seized a locked safe which belonged to Way, "on the ground that the safe, if open, would show that it contained intoxicating liquors which [the police] searched to use as evidence in the trial of Edwards." 82 S.E., at 133.

In holding that the seizure was illegal the Supreme Court of Georgia declared:

> "[T]he power of an arresting officer to take the property of the defendant, to be used as evidence of the crime charged against him in the warrant, is quite different from the taking of the property of third persons by virtue of no other process save that of the warrant against the accused. The constitutional protection against unreasonable seizure of property would go for naught, if it should be conceded that an arresting officer may arbitrarily possess himself of the property of a third person, taken from the place of business of such third person, solely upon the ground that it may be used as evidence against the defendant in the warrant. We find no authority which extends the power of an arresting officer so far. And, indeed, if one with a warrant for A., charging him with crime, may go into the house of B. and take therefrom property belonging to B., without other authority than that it may be used as evidence on the trial of A., *then the constitutional guaranty against unreasonable seizures would be mere idle words.*" (emphasis added)

82 S.E., at 133.

In *Commodity Mfg.*, which involved a motion to compel the return of books, papers, and documents seized from a third party, the N.Y. Supreme Court stated:

> "No case has been cited where the court has gone so far as to say that property, not an instrument of a crime, but only evidence of its

> commission, and which was the property of some one besides the defendant, could be seized either under a search warrant or as an incident of the arrest of defendant.
>
> "I can well believe that property used in the commission of a crime, even though belonging to a third party, might properly be seized, and also that property not used in the commission of the crime, but containing evidence of the commission of the crime, might properly be seized, where it is the property of the person accused; but to sanction the seizure of the property of innocent persons, or persons not accused, not used in the commission of the crime, but merely because they contained evidence of the crime, would open the door to grave abuse of invasion of property rights."

198 N.Y.S. at 47.

In support of the proposition that law enforcement agencies must first show that a subpoena duces tecum is impractical before a search warrant can issue against a third-party, plaintiffs cite *Bacon v. United States,* 449 F.2d 933 (9th Cir. 1971). In *Bacon* the Ninth Circuit held that an arrest warrant for a material witness cannot issue unless the judicial officer has by the facts and circumstances as presented to him "probable cause to believe that it may become impracticable to secure his presence by subpoena." 449 F.2d at 943. Plaintiffs argue by analogy that if one not suspected of a crime cannot be *arrested* unless there is a showing that subpoena

is impracticable,[2] one not suspected of a crime cannot be searched unless there is a showing that a subpoena duces tecum is impracticable.

Defendants attempt to distinguish *Bacon* on two grounds. Defendants first emphasize that *Bacon* was based on the statutory grounds of 18 U.S.C. § 3149 and Rule 46(b) of the Federal Rules of Criminal Procedure, not the Fourth Amendment, and that Rule 46(b) and § 3149 go further in protecting the individual than the Fourth Amendment requires.[3]

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[2]Obviously a subpoena was *not* impractical. First, this was a search of a newspaper office, and, as discussed above, a search warrant against a newspaper can issue only in very rare circumstances. Second, the Grand Jury—a body before which a subpoena duces tecum is returnable—convened less than two hours after the search took place. Third, there was no hint whatsoever that the sought after materials would be destroyed or removed from the jurisdiction.

[3]Federal Rules of Criminal Procedure Rule 46(b) reads:

> 46(b) Bail for Witness. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail.

18 U.S.C. § 3149 reads:

> § 3149. Release of material witnesses
>
> If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 3146: No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Re-

(Defendants' Memorandum at page 13). Defendants seem to forget that the courts read the Federal Rules of Criminal Procedure as implementing Fourth Amendment protections, and a rather strong presumption exists that the procedures mentioned in the Federal Rules are required by the Fourth Amendment. See *Giordenello v. United States*, 357 U.S. 480, 485 (1958). *Jones v. United States*, 357 U.S. 493 (1958). Moreover, defendants seem to be arguing that Rule 46(b) and § 3149 are so generous as to afford a citizen *more* protection than is required by the Fourth Amendment.[4] This argument suggests that the Fourth Amendment permits the arrest of a material witness without a showing that a subpoena is impractical. To state the proposition is to compel its rejection.

Second, defendants try to argue that even if the Fourth Amendment does require a showing that a subpoena is impractical before a material witness can be *arrested,* no such requirement should apply to

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lease may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

Added Pub.L. 89-465, § 3(a), June 22, 1966, 80 Stat. 216.

[4]Defendants totally misread *Bacon* when they say that "The Court of Appeals *rejected* the contention that the use of a subpoena was constitutionally required." The Ninth Circuit did not even remotely consider this question. The Court did mention, without ruling, the issue that Rule 46(b) and § 3149 may not afford the protectiions required by the Fourth Amendment; that is, the Fourth Amendment might require *more* than is showing that a subpoena is impracticable before a material witness can be arrested. 449 F.2d at 941. However, the Court, understandably, enough did not even mention the issue of whether Rule 46(b) and § 3149 were so generous as to afford a citizen *more* protection than is required by the Fourth Amendment.

seizures. But historically the right against unlawful seizures has if anything been *more* protected, not less protected, than the right against unlawful arrests. See Kaplan, "Search and Seizure: a No-Man's Land in Criminal Law", 49 Calif. L.Rev. 474 (1961); Orfield, "Warrant of Arrest in Summons upon Complaint in Federal Criminal Procedure", 27 U. Cinc. L.Rev. 1 (1958).

Bacon, then, would seem to compel the rule that no search warrant against a third party can issue unless the state makes a showing that a subpoena is impractical.

Defendants rely on *Warden v. Hayden,* 387 U.S. 294 (1967), for their proposition that third parties should be treated no differently than suspects. *Warden v. Hayden* reversed a series of cases that prohibits the use of warrants to seize "mere evidence".[5] The focus in *Warden,* however, was on *what* may be seized, rather than *who* may be made the subject of a warrant. The Court made no mention of any application or exceptions to third parties.

Actually, a close reading of *Warden v. Hayden* indicates that the Court was considering only suspects of a crime when it struck down the "mere evidence" rule. For example, the basis of the opinion seems to be that the exclusionary rule adequately protects Fourth Amendment rights and thus by allowing

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[5]*Gouled v. United States,* 255 U.S. 298 (1921); *Boyd v. United States,* 116 U.S. 616 (1886).

searches for "mere evidence" would not seriously jeopardize rights of privacy.

> The remedy of suppression, moreover, which made possible protection of privacy from unreasonable searches without regard to proof of a superior property interest, likewise provides the procedural device necessary for allowing otherwise permissible searches and seizures conducted solely to obtain evidence of crime.

387 U.S. at 307.

This heavy reliance on the exclusionary rule certainly suggests that the Supreme Court was considering only those suspected of a crime when it struck down the "mere evidence" rule. Note also the discussion, particularly by Mr. Justice Douglas in dissent, of the *Fifth* Amendment consideration. Discussions of self incrimination would seem rather irrelevant if the Court was considering those truly not suspected of committing a crime.

II

It should be apparent that means less drastic than a search warrant do exist for obtaining materials in possession of a third party. A subpoena duces tecum, obviously, is much less intrusive than a search warrant: the police do not go rummaging through one's home, office, or desk if armed only with a subpoena. And, perhaps equally important, there is no opportunity to challenge the search warrant prior to the intrusion, whereas one can always move to quash the subpoena before producing the sought-after mate-

rials. This procedural difference is important. Mistakes in the issuance of a warrant or subpoena have occurred; motions to suppress and motions to quash are not uncommon. In view of the differences in degree of intrusion and opportunity to challenge possible mistakes, the subpoena should always be preferred to a search warrant, for non-suspects.

For a variety of reasons the court believes that in all but a few instances a subpoena duces tecum is the proper—and required—method of obtaining material from a third party.

First, the tremendous value our society places on privacy, indicates that intrusions should take place only when "necessary". The history and importance of the Fourth Amendment have been well-documented, and there is no need for further elaboration in this opinion. See, *e.g.*, *Mapp v. Ohio,* 367 U.S. 643 (1961); *Weeks v. United States,* 232 U.S. 383 (1914). The intrusion from the execution of a warrant—a paramount concern of the Founding Fathers—is simply "unnecessary" in most situations involving non-suspects, since a "less drastic means" exists to achieve the same end.

Second, as a historical matter the notion of search warrants has involved only those suspected of a crime. See the discussion in *Henry v. United States,* 361 U.S. 98, 100 (1959), and *Kaplan,* op. cit., at 475-477.

> "It is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which

> consists in rummaging about among his effects to secure evidence against him."

United States v. Poller, 43 F.2d 911, 914 (2nd Cir. 1930) (opinion of Learned Hand, J.)

Third, if law enforcement agencies were not required to first explore the subpoena alternative in third-party situations, a third-party would receive no meaningful protection against an unlawful search, and there would be the rather incongruous result that one suspected of a crime would receive *greater* protection against unlawful searches than a third party. The chief remedy and protection against an unlawful search for one suspected of a crime is the suppression of the illegally obtained evidence. See *Mapp v. Ohio,* 367 U.S. 643 (1961); *Elkins v. United States,* 364 U.S. 206 (1960); *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920); *Weeks v. United States,* 232 U.S. 383 (1914). See also *People v. Cahan,* 44 Cal. 2d 434 (1955). Although the "exclusionary rule" may provide some vindication for a suspect whose Fourth Amendment rights have been violated, its basic purpose is to deter law enforcement from conducting unlawful searches ". . . to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States, supra,* at 217. No other meaningful "remedy" or "protection" exists for the victim of an unlawful search:

> "The experience of California that . . . other remedies have been worthless and futile is buttressed by the experience of other States. The

> obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court . . .".

Mapp v. Ohio, supra, at 652.

The Court in *Mapp* stated that without the exclusionary rule,

> ". . . the assurance against unreasonable federal searches and seizures would be 'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty'."

367 U.S. at 655.

Nor does it matter that the police have bothered to obtain a warrant if it is defective; the exclusionary rule applies to searches authorized by defective warrants as well. See, *e.g., Aguilar v. Texas,* 378 U.S. 108 (1964), *United States v. Anderson,* 453 F.2d 174 (9th Cir. 1971).

A third-party, however, does not have the protection or deterrent of the exclusionary rule, for by definition he is not about to be tried for a crime. Unlike one suspected of a crime the third party has no meaningful remedy or protection against an unlawful search, with or without a warrant, and an additional safeguard is necessary to assure that his

Fourth Amendment rights are not trampled. That protection is the obligation of law enforcement to use a subpoena duces tecum unless it is shown, through sworn affidavits,[6] that is is impractical to do so.

Nor should it matter that the law enforcement agencies did in fact go to the magistrate, or that probable cause did in fact exist to believe that a subpoena was impractical unless such probable cause was established by sworn statements to the magistrate. Courts do not excuse searches with defective warrants even if probable cause could have been demonstrated before the magistrate, but in fact was not. See, *e.g., Chapman v. United States,* 365 U.S. 610 (1961), *Aguilar, supra.* See also *Anderson, supra.* Procedural safeguards *must* be followed.

Thus, in order to assure that third-parties will have some meaningful protection against unlawful searches—protection that suspects now receive with the exclusionary rule—the subpoena duces tecum alternative should be required.[7]

A fourth factor supporting the requirement for the subpoena duces tecum alternative unless "impractical" is the *Bacon* case, discussed above. *Bacon v. United States,* 449 F.2d 933 (9th Cir. 1971). Rule

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[6]See *U.S. v. Anderson, supra.*

[7]Obviously the additional procedural requirement of exploring the subpoena alternative is not, for the third party, a total deterrent to Fourth Amendment violations, but neither is the exclusionary rule a "total deterrent" for the suspect. Both procedures, however, do afford *some* meaningful protection.

46(b) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 1349 state quite clearly that a material witness cannot be arrested or detained unless a subpoena is impractical.[8] Although Rule 46(b) and § 1349 are both silent on the requirement of probable cause, the Ninth Circuit, citing *Terry v. Ohio,* 392 U.S. 1 (1968), held that the Fourth Amendment requires a showing of probable cause to believe that a subpoena is impractical.[9] As plaintiffs have argued, if one not suspected of a crime cannot be *arrested* unless there is probable cause to believe that a subpoena is impractical, one not suspected of a crime cannot be *searched* unless there is probable cause to believe that a subpoena duces tecum is impractical.[10]

All of these factors compel the following rule: law enforcement agencies cannot obtain a warrant to conduct a third-party search unless the magistrate has probable cause to believe that a subpoena duces tecum is impractical. Any evidence that a subpoena is impractical must be presented in a sworn affidavit if the magistrate is to rely on it. *United States v. Anderson,* 453 F.2d 174 (9th Cir. 1971). In other words, even if facts and circumstances do exist that establish probable cause to believe a subpoena is im-

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[8]In fact a majority of state courts that have considered the question have held that in the absence of statutory authority there is no common-law power to detain witness at all before *actual disobedience* of a subpoena. See Carlson, "Jailing the Innocent: The Plight of the Material Witness," 55 Iowa L.Rev.1, 20-25 (1969).

[9]449 F.2d at 942.

[10]On the point that searches historically have been more protected than arrests, see generally, *Kaplan, op cit.*

practical, they must be set forth in a sworn affidavit or else the warrant is defective.

Obviously, one can envision numerous situations where a subpoena might or might not be "impractical", and the Court will not attempt to consider them all specifically at this time. Several factors, however, should be emphasized for consideration by the magistrate. First, the mere failure to respond to a subpoena duces tecum should not, without more, be grounds for issuing a search warrant. The normal remedy for failure to respond to a subpoena is a contempt proceeding. See Rule 17(g) of Fed. Rules of Crim. Proc. and Rule 45(f) of the Fed. Rules of Civ. Proc. See, generally, Wright, *Federal Practice and Procedure,* § 279. Thus, even if the subpoena has been disregarded, it is questionable if a magistrate should still issue a warrant.[11]

Second, a subpoena can be impractical if the destruction of evidence is threatened. Although Cal. Pen. Code § 135 makes the destruction of evidence a crime, the criminal statute alone may not provide a sufficient deterrent if the destruction of materials is truly imminent. A court certainly possesses the power to issue a restraining order where it is presented with evidence that the materials are about to be taken from the jurisdiction or their destruction is imminent. See *Demich, Inc. v. Ferdon,* 426 F.2d 643 (9th Cir. 1970), *vacated and remanded on other grounds,*

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[11] *Mancusi v. DeForte,* 392 U.S. 364 (1968) unfortunately does not settle whether (or when) a search warrant can issue if a subpoena is disregarded.

401 U.S. 990 (1971); *Bethview Amusement Corp. v. Cahn,* 416 F.2d 410 (2nd Cir. 1969). Only if it appears that the materials will be destroyed or removed from the jurisdiction despite the restraining order, or that there simply is not time to obtain a suitable order, should a magistrate find probable cause to believe that a subpoena is impractical.

Another important factor the magistrate should consider is whether First Amendment interests are involved. Defendants, citing the United States Supreme Court case *Branzburg v. Hayes, et al.,* 70-85, and companion cases *In the Matter of Paul Pappas,* 70-94, and *United States v. Carl Caldwell,* 70-57, seem to argue that newsgathering is not protected by the First Amendment, and that newspapers, reporters, and photographers therefore have no greater Fourth Amendment protections than other citizens. (Defendants' Memorandum at p. 7). Both the premise and conclusion are incorrect, however. *Branzburg* clearly states that the First Amendment protects newspapers in their newsgathering functions:

> "We do not question the significance of free speech, press or assembly to the country's welfare. Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be evicerated." (Slip Opinion at p. 15)
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> "Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose

wholly different issues for resolution under the First Amendment.

Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect Courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth."

(Slip Opinion, at p. 42)

Mr. Justice Powell, whose vote was necessary to the Court's judgment, emphasized in his concurrence the "limited nature of the Court's holding".

"The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safe-guarding their sources. Certainly, we do not hold, as suggested in the dissenting opinion, that state and federal authorities are free to "annex" the news media as 'an investigative arm of government'. The solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort, even if one seriously believed that the media—properly free and and untrammeled in the fullest sense of the terms —were not able to protect themselves. . . .

Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relation-

> ships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interest on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." (Slip Opinion, at p. 1)

While conceding that some First Amendment harms might take place if reporters can be compelled to testify before a grand jury, the Court believed that the societal interest in unimpeded grand jury investigations is a "compelling state interest", sufficient to outweigh the First Amendment harms. (Slip Opinion, at p. 24) The majority emphasized repeatedly that the basis of its decision was this "compelling state interest" in grand jury investigations.

The other aspect of defendants' argument—that newspapers, reporters and photographers have no greater Fourth Amendment protection than other citizens—is also without merit. The First Amendment is *not* superfluous. Numerous cases have held that the First Amendment "modifies" the Fourth Amendment to the extent that extra protections may be required when First Amendment interests are involved. See, *e.g., A Quantity of Books v. Kansas,* 378 U.S. 205

(1964); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Demich, Inc. v. Ferdon*, 426 F.2d 643 (9th Cir. 1960); *vacated and remanded on other grounds*, 401 U.S. 990 (1971); *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410 (2nd Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). See also *NAACP v. Alabama*, 357 U.S. 449 (1958). *Branzburg* does not purport to overrule these cases; it fails to even mention them. In short, one cannot logically read *Branzburg* to relegate the First Amendment to redundancy.

The First Amendment infringements with searches of newspapers are quite serious. The majority in *Branzburg* was troubled by the uncertainty as to "how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury." (Slip Opinion, at p. 27) The threat to the press's newsgathering ability, however, is much more imposing with a search warrant than with a subpoena.

1) A reporter or photographer responding to a subpoena will bring to the grand jury hearing only those materials mentioned in the subpoena; the police officers executing a warrant, however, will be in a position to see notes and photographs not even mentioned in the warrant. As is apparent from the affidavits, newspaper offices are much more disorganized than, say, the average law office; a search for particular photographs or notes will mean rummaging through virtually all the drawers and cabinets in the office. The "indiscriminate nature" of such a search

renders vulnerable[12] all confidential materials, whether or not identified in the warrant, and the concomitant threat to the gathering of news—which frequently depends on confidential relationships[13]—is staggering.

2) Unlike the issuance of a subpoena or subpoena duces tecum, the *ex parte* issuance and execution of a search warrant deprives the newspaper and newsman of that "judicial control" thought so essential in *Branzburg*. (See majority opinion at Slip Opinion, p. 42, and concurrence of Powell, J. at p. 2).

3) There is also a possibility that police searches will jeopardize a newspaper's credibility and create a risk of self-censorship. (See Affidavits of Walter Cronkite, Frank P. Haven, Gordon Manning, and Gene Roberts.)

Because a search presents an overwhelming threat to the press's ability to gather and disseminate the news, and because "less drastic means" exist to obtain the same information,[14] third-party searches of news-

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[12]It is irrelevant that the police are instructed not to "read" or "look closely" at photographs or notes not mentioned on the warrant because a) it is difficult to imagine how a policeman searching for a photograph or set of notes will not "read" or "look closely" at items not mentioned in the warrant and b) the major harm to the press comes with the public knowledge that the police will be in a position to see confidential material.

[13]See *e.g., Blasi Press Subpoenas:* An Empirical and Legal Analysis (1972).

[14]See *Branzburg, supra.* On the "less drastic means" policies in the First Amendment area, see *Shelton v. Tucker,* 364 U.S. 479 (1960); *Louisiana ex rel. Gremillion v. NAACP,* 366 U.S. 293 (1961); Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464 (1969).

paper office[15] are impermissible in all but a very few situations. A search warrant should be permitted only in the rare circumstance where there is a *clear showing* that 1) important materials will be destroyed or removed from the jurisdiction; *and* 2) a restraining order would be futile. To stop short of this standard would be to sneer at all the First Amendment has come to represent in our society.

Turning now to the April 12, 1971 search, it should be apparent that the search was unlawful. a) It was a third-party search; defendants, although given ample opportunity, have submitted no affidavits showing that any member of the Daily organization was suspected of unlawful participation in the April 9 fracas at the Stanford University Hospital; b) No affidavits were submitted to the magistrate demonstrating probable cause to believe that a subpoena was impractical.[16]

Defendants, however, contend that even if the April 12, 1971 search was unlawful the court cannot consider the summary judgment question because of two procedural obstacles: 1) the plaintiffs lack standing

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[15]The Court believes it is unnecessary to consider the situation when someone connected with the newspaper office *is* suspected of a crime.

[16]Defendant Craig Brown has submitted to the Court an affidavit that attempts to show why, in his opinion, a subpoena was "impractical". The affidavit, based mainly on hearsay, does not establish probable cause to believe that a search warrant was impractical. Moreover, even if the affidavit did establish probable cause, it was not submitted to the magistrate; any evidence that probable cause existed to conclude that a subpoena was impractical must be within the "four corners of the affidavits" before the magistrate. See *United States v. Anderson, supra.*

to question the legality of the search; and 2) the legality of the April 12 search is now a moot question. Clearly all of the plaintiffs have standing to contest the legality of the search. See *Mancusi v. De Forte,* 392 U.S. 364 (1968); *Jones v. United States,* 362 U.S. 257 (1960); *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920).

It is also clear that the legality of the April 12 search is not a moot question. Defendants have maintained throughout this entire case that they would search the Daily pursuant to warrant again should the same circumstances arise. (See, *e.g.,* paragraph 9 of answer of defendants Bergna, Brown, and Phelps.) Plaintiffs alleges that the April 12 search and the threat of similar searches in similar circumstances in the future:

> ". . . causes persons participating in meetings, demonstrations and rallies to refuse necessary cooperation to THE STANFORD DAILY reporters and photographers thereby making it impossible for them adequately to cover the events; (2) causes persons to to refuse to give confidential information to STANFORD DAILY reporters lest such information be disclosed to the police; 3) causes THE STANFORD DAILY photographer and reporters to engage in self-censorship in order to avoid producing materials which the police may wish to seize; and (4) renders THE STANFORD DAILY unable to maintain notes, files and records, including photographic records, necessary for the fulfillment of THE STANFORD DAILY's journalistic function for fear that possession of certain materials

will cause the police again to search the offices of THE STANFORD DAILY."

The affidavits of the Daily staff clearly document the undermined confidence in the Daily among fellow students as a result of this search and note their own reluctance toward aggressive newsgathering. The continuing effect of the search is undeniable. (See affidavits of Kohn, Lyle, Mann, Tollefson, and Ungar). Plaintiffs have a substantial stake in the judgment of this Court. Moreover, because evidence from third parties not sought to be introduced against the party, is not subject to a motion to suppress, a ruling that the present question is moot would deny any effective review of defendants' unconstitutional action. No such ruling is required here. *Cf. Sibron v. New York,* 392 U.S. 40 (1968).

No factual issues remain with regard to the April 12 search. It was a search of a third-party, and defendants failed to establish probable cause to believe that a subpoena was impractical. Consequently, plaintiffs' motion for a declaratory judgment that the April 12 search at the Stanford Daily offices was illegal is granted.

Plaintiffs have also moved for an injunction against similar future searches by defendants. The defendants in this case are the District Attorney of Santa Clara County, an assistant District Attorney for Santa Clara County, the Chief of Police for the City of Palo Alto, and four members of the Palo Alto Police Force. All are respected members of the com-

munity, and each plays an important role in the law enforcement process. There is no reason to believe that, after the declaratory judgment concerning the April 12 incident, defendants will conduct such a search against the plaintiffs in the future. The court anticipates that this decision will be honored and that an injunction is unnecessary. In the unlikely event that defendants do conduct such a search against plaintiffs in the future, plaintiffs are free to renew their motion for a permanent injunction.

Dated, October 5, 1972

/s/ Robert F. Peckham
United States District Judge

Appendix D

In the United States District Court
Northern District of California

No. C-71-912 RFP

The Stanford Daily, et al.,
Plaintiffs,

vs.

James Zurcher, individually and as Chief of Police of the City of Palo Alto, County of Santa Clara, State of California, et al.,
Defendants.

[Filed Aug. 10, 1973]

MEMORANDUM AND ORDER

This lawsuit had its genesis when several members of the Palo Alto Police Department, acting pursuant to a warrant, engaged in a search of the offices of the *Stanford Daily,* Stanford University's campus newspaper. Defendants are members of the Palo Alto Police Department, the District Attorney for Santa Clara County, and one of his deputies, each named individually and in his official capacity. The plaintiff is the Stanford Daily, an unincorporated association,[1] and its student editors.

[1]See Fed. Rule Civ. Pro., Rule 17(b); Cal. Code Civ. Pro. §388(a) (West 1973).

Defendants, throughout this litigation, have maintained that the search of the *Daily* office, although no one at the *Daily* was suspected of committing a crime, was an entirely legal act, and they further maintain that they would conduct such a search again under similar circumstances.

I.

Pursuant to 42 U.S.C. § 1983 (1970) plaintiffs brought suit in this court seeking declaratory relief and an injunction. On October 5, 1972, this court ruled, as to those not suspected of a crime, third parties, that the warrant was insufficient to comply with the fourth amendment when it appears that there was available to law enforcement personnel an alternative course of conduct which could achieve the same end in a manner much less intrusive upon the concerns voiced in the fourth amendment.[2] In other words, the court ruled that the law enforcement personnel must explore the *subpoea duces tecum* alternative before obtaining and executing a warrant for the search of those not suspected of criminal activity.[3] During the pendency of the litigation, this court was surprised at the dearth of litigation on the question of the fourth amendment rights of third parties. *Id.* at 127. One possible explanation was that investigative agencies normally use the subpoena alternative

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[2]Memorandum and Order reported 353 F.Supp. 124 (N.D. Cal. 1972); Note, 86 HARV. L. REV. 1317.

[3]The court granted declaratory relief only but left upon the possibility that an injunction might issue if plaintiffs presented to the court facts which would indicate that declaratory relief alone was not sufficient to protect plaintiffs' rights as declared.

to achieve their objective in examining materials of third parties.

Another possible explanation is that a defense to an action for monetary damages under 42 U.S.C. § 1983 brought against a law enforcement officer is that the officer acted in good faith. *Pierson v. Ray*, 386 U.S. 547 (1967).[4] If a party chooses to vindicate his fourth amendment rights which have allegedly been violated by a law enforcement officer, albeit in good faith, he is relegated to declaratory and injunctive relief.[5] The aggrieved person must be prepared to make the kind of showing which would warrant equitable relief. And lastly, for no pecuniary gain, he is required to engage in extensive litigation at considerable cost including attorney's fees, just for the satisfaction of having a court determine that the police violated the Constitution, and possibly obtaining an injunction if he can show that there is a real possibility the violation may reoccur.[6]

It is not surprising that when faced with the costs of interminable litigation against a city and county with relatively unlimited resources measured against the limited satisfaction obtained when and if relief is finally given, many potential plaintiffs are unwil-

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[4]See text accompanying note 19, *infra*.

[5]*Cf. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 408 (1971). *See also Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir.), *cert. denied* 400 U.S. 833 (1970).

[6]*See* Note, *The Federal Injunction as a Remedy for Unconstitutional Policy Conduct*, 78 Yale L.J. 143 (1968).

ling to take on the task of "fighting City Hall." At a time when legal costs, particularly attorney's fees are rising, third party rights protected by the fourth amendment, while existing in theory, in practice have no meaningful effect.

This situation may be contrasted to a criminal defendant, who has a relatively adequate remedy by way of a supression hearing to determine the legality of the search. *See Mapp v. Ohio,* 367 U.S. 643 (1961); *Elkins v. United States,* 364 U.S. 206 (1960). The criminal defendant, unlike the third party, has an extraordinary incentive to vindicate his fourth amendment right to obviate a successful prosecution against him. And if he cannot afford counsel, one will be appointed for him.

The rights expressed in the fourth amendment are in constant tension with expedient law enforcement. *Almeida-Sanchez v. United States,* 41 U.S.L.W. 4970 (June 21, 1973). But it is the job of every citizen to insure that overzealous law enforcement personnel do not compromise the high values placed on privacy in our society. It is important to remember that the fourth amendment protects all the people, and not just those suspected of a crime. It would be a cruel irony if those people who harbored contraband had an adequate incentive to pursue an effective remedy for violations of their fourth amendment rights, while those who engage in entirely legal activity, because of the economic realities of the cost of attorney's fees must allow their constitutional rights to go unvindicated.

The plaintiffs have moved for an award of reasonable attorney's fees. For the reasons which follow, the motion is granted.

II.

It has been the general view in this country, absent statutory direction, that attorney's fees are not ordinarily awardable as a cost of litigation.[7] In England, the courts have discretion to award a reasonable allowance for attorney's fees since the court was to make the prevailing party whole.[8]

The English rule which awards attorney's fees as costs to the plaintiff or defendant, whoever prevails, also has the effect of promoting settlement. The generally accepted American view is that recourse to litigation is not wrong, and that the party who does not prevail ought not be penalized for his resort to the courts to vindicate his rights.[9] It is indeed ironic that the very purpose of the general American rule, not to deter litigation, is in many cases having the exact opposite effect. The inability to get attorney's fees directly, or indirectly, through damage awards, has the effect of deterring many potential plaintiffs from seeking redress in the courts. *See Newman v. Piggie*

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[7]The American rule was originally adopted when counsel fees were awarded by courts as a fixed sum of money, pursuant to a schedule. In a period of rising prices the attorneys successfully abolished court fixed fees. Goodhart, *Costs*, 38 YALE L. J. 849, 854 (1929; Note, 77 HARV. L. REV. 1135 (1964); Enrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966).

[8]6 J. Moore, *Federal Practice* 1703.

[9]Note, 77 HARV. L. REV. 1135 (1964). Nor are attorney's fees directly awardable as damages. *Day v. Woodworth*, 13 How. 363 (1851); 6 J. Moore, *Federal Practice* 1704.

Park Enterprises, 390 U.S. 400 (1969) (per curiam).[10] While legal aid offices[11] and contingent fee arrangement, where damages would lie,[12] have provided some legal services for those who could not otherwise afford them, there is no doubt that new methods of financing legal services to all levels of society must be explored.[13] Accordingly many commentators have questioned the continuing vitality of the American rule, and its effect on the delivery of legal services.

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[10]The Court in *Piggie Park* intimated no view, nor is the legislative history clear as to whether a party who successfully defends an action under Title II of the Civil Rights Act of 1964, §204(a), 42 U.S.C. § 2000a-3 would be a prevailing party. Nor whether if a prevailing party, different factors might guide a court's discretion. See *Northcross v. Memphis Bd. of Ed.,* 41 U.S.L.W. 3635 (June 4, 1973).

[11]There are approximately 355,000 attorneys licensed to practice in the United States, and only 2,500 work for legal services. Prepaid Legal Services, transcript of proceedings of a national conference held by ABA Special Committee on Prepaid Legal Services held in Washington, D.C., April 27-29, 1972 at 1. *See also* Brief of National Legal Aid and Defenders Association, *Amicus Curiae* in *La Raza v. Volpe,* 73-1145 (9th Cir., appeal filed Dec. ....., 1972).

A former Director of the Office of Economic Opportunity estimates that legal services meet only about 28% of poor people's needs. Testimony of Frank Carlucci, hearings on H.R. 40, H.R. 185, H.R. 357, etc. before the House Committee on Education and Labor, 92 Cong., 1st Sess. pt.e at 1S66-67 (1971).

See J. Falk and S. Polack, *Political Interference with Publicly Funded Lawyer: The CRLA Controversy and the Future of Legal Services,* 24 Hast. L.Rev. 599 (1973).

[12]The principles which underlie the contingent fee arrangement may have some bearing in determining what amount constitutes a reasonable attorney's fee where Congress or the courts provide for such an award. See Disciplinary Rule 2-106 of the Code of Professional Responsibility of the American Bar Association.

[13]See McLaughlen, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services,* 40 Ford. L. Rev. 761 (1972): See Sen. Rep. 93-146 accompanying S. Res 101, 93rd Cong., 1st Sess. (1973) authorizing a new subcommittee of the Senate Judiciary Committee to inquire into, inter alia, new methods of financing the delivery of legal services.

Many have suggested a liberalization of the strict American rule.[14]

III.

To ameliorate the inequities, both Congress and the courts have made inroads into the strict application of the American rule. It is not beyond dispute that federal courts have equitable powers to award attorney's fees in appropriate cases. *Sprague v. Ticonic National Bank,* 307 U.S. 161, 166 (1939). It is also well established that ". . . in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorney's fees when the interest of justice so requires. *Hall v. Cole,* 41 U.S.L.W. 4658, 59 (May 21, 1973); *Mills v. Electric Auto-Lite,* 396 U.S. 375 (1970).

The only question for a district court is then, whether in the exercise of its equitable powers, the interest of justice requires that fees be shifted. There are two parts to this question. First, is this the type of case in which the court has discretion to award attorney's fees as cost? And if so as a matter of the court's discretion, is this an appropriate case?

A. *Type of case.*

In *Sprague v. Ticonic National Bank,* 307 U.S. 161 (1939) the Court held that attorney's fees can be

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[14] Ehrenzweig, *supra,* Stoebuck, *Counsel Fees Included in Costs: A Logical Development,* 38 U. Colo L. Rev. 202 (1966) McLaughlen, *supra,* Kuenzel, *The Attorney's Fee: Why not a Cost of Litigation?* 49, Iowa L. Rev. 75 (1963) Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?* 20 Van. L.Rev. 1216 (1967); Note, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.,* 38 U. Chi. L. Rev. 316 (1971).

awarded when the judgment results in a "common fund" for the plaintiffs or for the class. In *Mills v. Electric Auto-Lite,* 396 U.S. 375 (1970), the Court approved the award of attorney's fees to shareholders who succeeded in setting aside a corporate merger. The Court extended the scope of the common fund rationale by holding that no pecuniary benefit need be demonstrated. *Id.* at 393. As this court pointed out in *La Raza Unida v. Volpe,* 57 F.R.D. 94 (N.D. Cal. 1972), *Mills* represents both the defensive and affirmative use of the Court's equitable powers. Defensive to prevent unjust enrichment of free riders and affirmative or offensive to promote the effective implementation of the Congressional objective of fair and informed corporate suffrage, *Id.* at 98.

In *Newman v. Piggie Park Enterprises,* 390 U.S. 400 (1968), in interpreting the scope of the reasonable attorney's fee provision under Title II of the Civil Rights Act of 1964, 204(b), 42 U.S.C. § 2000 a-3 (b), the Court found that fees were awardable as costs "not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II." In essence, the Court found, in determining Congress's objective, that the general American Rule, not to award attorney's fees as costs, was having the opposite effect from its intent. Far from promoting a judicial determination of rights, at least in the equitable relief area, the policy of not awarding fees was an obstacle to a judicial determination of rights.

Mills and *Piggie Park* touched responsive chords, and the federal judiciary responded in a myriad of decisions indicating that where a plaintiff seeks only equitable relief, that strict application of the American rule no longer makes sense as a policy to promote access to courts. *Hall v. Cole,* 41 U.S.L.W. 4658 (May 21, 1973); *Northcross v. Memphis Board of Ed.,* 41 U.S.L.W. 3635 (June 4, 1973); *Sims v. Amos,* 409 U.S. 936 aff'g. 340 F. Supp. 691 (M.D. Ala. 1972); *Knight v. Auciello,* 453 F.2d 852 (1st Cir. 1973); *McEnteggart v. Cataldo,* 451 F.2d 1109 (1st Cir. 1971); *Gartner v. Soloner,* 384 F.2d 348 (3rd Cir. 1967); *Brewer v. School Bd.,* 456 F.2d 943 (4th Cir. 1972), *cert. denied,* 92 S.Ct. 1778; *Lee v. Southern Home Sites Corp.,* 444 F.2d 143 (5th Cir. 1971); *Callahan v. Wallace,* 466 F.2d 59 (5th Cir. 1972); *Cooper v. Allen,* 467 F.2d 836 (5th Cir. 1972); *Donahue v. Staunton,* 471 F.2d 475, 482 (7th Cir. 1972); *Yablonski v. United Mine Workers,* 466 F.2d 424 (D.C. Cir. 1972), *cert. denied,* 40 L.W. 3512 (1973); *La Raza Unida v. Volpe,* 57 F.R.D. 94 (N.D. Cal. 1972); *Johnson v. San Francisco Unified School District,* Civ. No. 70-1331 SAW (N.D. Cal. decided Sept. 12, 1972).

Ross v. Goshi, 351 F. Supp. 949 (D. Haw. 1972); *Jinks v. Mays,* 350 F. Supp. 1037 (N.D. Ga. 1972); *Newman v. Alabama,* 349 F. Supp. 278 (M.D. Ala. 1972); *Wyatt v. Stickney,* 344 F. Supp. 408 (M.D. Ala. 1972); *NAACP v. Allen,* 340 F. Supp. 703 (M.D. Ala. 1972); *Shull v. Columbus Mun. Separate School Dist.,* 338 F. Supp. 1376 (N.D. Miss. 1972); *Local 4076 United Steelworkers v. United Steelworkers,* 338

F. Supp. 1154 (W.D. Pa. 1972); *Moore v. Knowles,* 333 F. Supp. 53 (N.D. Tex. 1971); *Brown v. Ballas,* 331 F. Supp. 1033 (N.D. Tex. 1971); *Hammond v. Housing Authority and Urban Renewal Agency of Lane County,* 328 F.Supp. 587 (D. Ore. 1971); *Lyle v. Teresi,* 327 F. Supp. 683 (D. Minn. 1971).

While various rationales have been given for including attorney's fees as costs, the courts are in essence making a judgment that including attorney's fees as cost is an additional remedy necessary to effectuate the congressional underpinnings of a substantial program.

The equitable federal powers to imply remedies is not new. Act of May 8, 1972, §2, 1 Stat. 276; C. Wright, Law of Federal Courts, 257 (2d ed. 1970.)[15] As Justice Harlan wrote, concurring in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971):

> "Thus, in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute. *J.I. Case v. Borak,* 377 U.S. 426 (1964); *Tunstall v. Brotherhood of Locomotive Firemen & Engineermen,* 323 U.S. 210, 213 (1944). *Id.* at 402.

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[15] *Bell v. Hood,* 327 U.S. 678 (1946); *J. I. Case Co. v. Borak,* 337 U.S. 426 (1947); *Deckert v. Independence Corp.,* 311 U.S. 282 (1940); *Mitchell v. De Mario Jewelry,* 361 U.S. 288 (1960); *Swann v. Board of Ed.,* 402 U.S. 1 (1971).

The Court in *Bivens* held that in order to protect encroachment by federal officers on rights protected by the fourth amendment, it was necessary to imply a particular remedial mechanism, that is, suits for damages.

In *J.I. Case v. Borak, supra,* the Court " 'implied'—from what can only be characterized as an 'exclusively procedural provision' affording access to a federal forum . . . a private cause of action for damages for violation of § 14(a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U.S.C. § 78n(a)." *Bivens,* 403 U.S. at 403 n.4. In *Mills,* the Court found that the policies expressed by Congress in the same statute also required that an award of attorney's fees be made because this would "provide an important means of enforcement of the proxy statute." 396 U.S. at 396.

In *Bivens,* after recognizing the inherent equitable power to imply remedies, the late Justice Harlan passed to the question of whether a damages remedy would be appropriate. In reaching the conclusion that implying a damage action is appropriate in the fourth amendment area, he relied on the fact that no other alternative remedy was provided to insure the vindication of the right in question, and that the right ranked sufficiently high on the social scale that it was worthy of protection.[18]

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[18]Congress has by statute recognized that certain classes of rights rank high on the nation's social priorities and have given to plaintiffs the additional remedy of fee shifting. *See e.g.,* 42 U.S.C. § 2000a-3(b) (public accommodations); 42 U.S.C. § 2000 (e)-5(k) (equal employment); 42 U.S.C. § 3612(c) (fair housing). See also Education Amendments of 1972 § 718, 41 U.S.L.W. 45

In *Bivens,* Harlan concluded that the fourth amendment area was peculiarly suited for judicial supervision and remedy formulation. *Id.* at 405-410. *See Mapp v. Ohio, supra. See also Bell v. Hood, supra.* To the plaintiffs in *Bivens* the exclusionary rule was irrelevant and injunctive relief was unlikely. Additionally he found that the rights protected by the fourth amendment ranked at least as high on our social value as the rights of stockholders defrauded by misleading proxies. *Bivens,* 403 U.S. at 411. *See J.I. Case v. Borak, supra,* giving private damage remedy, and *Mills, supra,* awarding attorney's fees as costs thereby insuring that the right of action given in *J.I. Case Co.,* will in fact be brought.

Applying the criteria for the appropriate use of the court's equitable power to imply remedies to the instant motion, it would seem fee shifting is appropriate. First, there is in the fourth amendment no detailed pattern of remedies such that one could fairly draw the inference that the remedies provided were complete. *See Fleishman Distilling Corp. v. Maier Brewing Co.,* 386 U.S. 714 (1967). *See also Bivens, supra.* The absence of a "meticulously detailed" pattern of remedies has been one signal that attorney's fees may be awarded as costs. *Mills,* 396 U.S. at 391. *Accord Hall v. Cole, supra; Lee v. Southern Homes,* 444 F.2d at 145; *La Raza Unida v. Volpe,* 57 F.R.D. at 99.

(June 23, 1972). *Compare* Opinion of the Court in *Hall v. Cole, supra, with* dissent of White, J. arguing that internal labor disputes were not of sufficient public concern to imply an attorney's fee award.

Like *La Raza,* no remedial action can be expected from public officials, as they are named as defendants in the action. Moreover, in *J.I. Case Co., supra,* and *Mills, supra,* the Court was not content to rely solely on public enforcement by the Securities Exchange Commission for the important rights proclaimed in the statute.

Additionally, 42 U.S.C. § 1983 and its jurisdictional concomitant, 28 U.S.C. § 1343(3) represents congressional indication that federal courts should use their equitable powers to insure vindication of the rights protected by the Constitution and laws from infringement by those acting under color of state law, by implying an award of attorney's fees as costs. *Jinks v. Mays,* 250 F. Supp. 1037 (N.D. Ga. 1972). *See Donohue v. Stanton,* 471 F.2d 475, 482 (7th Cir. 1972); *N.A.A.C.P. v. Allen,* 340 F.Supp. 703 (N.D. Ala. 1972). The *raison d'etre* of 42 U.S.C. § 1983 is to encourage the vindication of constitutional rights, to promote litigation of the rights involved, and to give the courts leeway to fashion appropriate remedies. *Cf.* 42 U.S.C. § 1988.

As to placing a high social order on the rights in question, there can be no doubt as to the importance of the fourth amendment. The Court in *Almeida-Sanchez v. United States,* 41 U.S.L.W. 4970 (June 21, 1973) recently recalled the words of Justice Jackson on his return from the Nurenberg Trials:

> These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among the deprivation of rights, none is so effective in cowing a

> population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. *Brinegar v. United States,* 388 U.S. 160, 180 (Jackson, J., dissenting).

Accordingly this court feels that in equitable suits to remedy violations of fourth amendment rights of those not suspected of criminal activity, an award of attorney's fees as costs is within the court's power and responsibility. Where as here fee shifting is necessary to insure the vindication of important constitutional rights[17] and appropriate because of the inadequate remedies otherwise available, because it is consistent with a remedy increasingly furnished by Congress, and because of the high social value placed upon the rights involved, an award of attorney's fees as costs is essential, lest these important rights be relegated to a mere platitude.

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[17]It has been argued that the *Daily* is a clearly identifiable plaintiff, so that even absent fee shifting these types of plaintiffs, not representatives of a class, might have sufficient incentive to litigate the matter. First it must be noted that other courts have not required class action status as a prerequisite to fee shifting. *See Donohue v. Stanton.* 471 F.2d 475 (7th Cir. 1972). Nor is class action status a requirement under any of the statutory schemes provided by Congress. See note 16, *supra.* Second, the Daily was fortunate enough to have a law professor on the Stanford campus willing to bring the litigation. But this Court has already indicated its unwillingness to rest the vindication of important rights on the chance that some attorney, public interest law firm, or legal aid agency will be willing to represent the plaintiff without hope of remuneration. *La Raza,* 57 F.R.D. at 101. *See also Id.* at 98 n.6.

B. Appropriateness of Fees in This Case.

Having determined that this is the type of case in which an award of attorney's fees as costs might be appropriate, the matter of the exercise of the court's discretion is not difficult.[18] Even when no statute is involved, fees should ordinarily be awarded as costs in the appropriate type of case, unless there is an affirmative, articulated reason for the denial. *Cooper v. Allen,* 467 F.2d 836 (5th Cir. 1972). *See Northcross v. Memphis Bd. of Ed., supra.* (statutory authorization).

Here counsel for plaintiff effectively represented his client and aided the court in an area scant with precedent to guide its decision. Accordingly this court finds that, this is the type of case in which the court has discretion to award the fees as costs, and this is an appropriate case for the exercise of that discretion.

IV.

Lastly, the defendants argue that they may assert as defense to the assessment of attorney's fees as coss, the legal defense to an action for monetary damages that the law enforcement acted in good faith and upon probable cause.[19] *Pierson v. Ray,* 386 U.S. 547 (1967); *Anderson v. Reynolds,* 342 F.Supp. 101 (D. Utah 1972) (policeman); *Ney v. State of California,* 439 F.2d 1285, 1287 (9th Cir. 1971); *Dodd v. Spokane*

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[18] *Kelly v. Guinn,* 456 F.2d 100 (9th Cir. 1970).

[19] *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 456 F.2d 1339 (2d Cir. 1972). (on remand)

County, Washington, 393 F.2d 330 (9th Cir. 1968) (District Attorney in his investigative function).

Where an award of attorney's fees is made as an element of the costs of equitable litigation incident to the vindication, of otherwise unremediable constitutional rights, the fact that a prior action was taken in good faith would not seem relevant. An award for attorney fees and an award for damages have historically been separated. *See Day v. Woodworth,* 13 How. 363 (1851); 6 J. Moore, FEDERAL PRACTICE 1704. Unlike damages an award of attorneys' fees is not imposed in any way to penalize, stigmatize, or punish the defendants for wrongdoing. At this court said in *La Raza, supra:*

> We cannot emphasize enough that in granting this motion, the purpose is not to saddle the losing party with the financial burden in order to punish him, rather we shift the financial burden in order to effectuate a strong Congressional policy. *Accord Mills,* 396 U.S. at 396-97. *Id.* at 102.

Moreover an award of attorney's fees as cost, at least in California, will not have the undesirable effect of hampering zealous law enforcement which so concerned the Court in *Pierson, supra.* For it is the law in this state that there is a mandatory duty of the City Attorney, or the County Counsel to *defend* the policemen or the district attorney. Any judgment against the public official shall be paid by the public entity which employed the individual, provided that he was acting within the scope of his employment at the time. Cal. Gov't. Code § 825, *et seq.* As such the action may proceed without any personal involvement

on the part of the individual. As the court said in *Sinclair v. Arnebergh,* 224 Cal. App. 2d 595 (1964):

> With such protection afforded the public can expect that its laws will be zealously enforced without any hesitation occasioned by consideration of possible personal involvement in defending resulting litigation. *Id.* at 597-98.

See also 42 U.S.C. §1988; *Hesselgesser v. Reilly,* 440 F.2d 901 (9th Cir. 1971) cited with approval in *Moor v. County of Alameda,* 41 U.S.L.W. 4627 (May 14, 1973).

Accordingly this court finds that the legal defense of good faith enforcement of the law, found not to be abrogated by 42 U.S.C. § 1983, as against an action seeking monetary damages, has no place here where equitable relief is sought to declare rights and enjoin further illegal action. This is especially so in California where the public, and not the individual officer, will bear the responsibility for litigation and pay any judgment for attorney's fees rendered against the law enforcement personnel. The motion for an award of reasonable attorney's fees as costs is granted.

Dated: August 10, 1973

/s/ Robert F. Peckham
Robert F. Peckham
United States District Judge

Appendix E

In the United States District Court
Northern District of California

No. C-71-912 RFP (SJ)

The Stanford Daily, et al.,
Plaintiffs,

vs.

James Zurcher, individually and as Chief of Police of the City of Palo Alto, County of Santa Clara, State of California, et al.,
Defendants.

[Filed Jul. 17, 1974]

MEMORANDUM AND ORDER

On October 5, 1972, this court ruled on plaintiffs' motion for summary judgment and granted declaratory relief which upheld the constitutional rights of individuals, not suspected of any crime, to be free from unwarranted police searches and seizures. *The Stanford Daily v. Zurcher,* 353 F.Supp. 124 (N.D.Cal. 1972). Subsequently, on August 10, 1973, the court granted plaintiffs' motion for an award of reasonable attorneys' fees. *The Stanford Daily v. Zurcher,* F.Supp. (N.D.Cal. 1973). Now, the court must determine what amount actually constitutes reasonable attorneys' fees.

The federal appellate courts, recognizing the difficulty of weighing the factors relevant to the determination of reasonable fees, grant federal district courts wide discretion in setting attorneys' fees. *See, e.g., Kelly v. Guinn,* 456 F.2d 99, 111 (9th Cir. 1972); *Cato v. Parham,* 403 F.2d 12, 16 (8th Cir. 1968); *Twentieth Century Fox Film Corp. v. Goldwyn,* 328 F.2d 190, 221 (9th Cir. 1964). However, district courts' exercise of this grant of discretionary authority must be kept within certain evidentiary bounds. See, *e.g., Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974). The court must avoid the Scylla of simply accepting the attorneys' account of the value of the legal services which they have provided. "The court cannot properly fix attorneys' fees merely by multiplying the hourly rate for each attorney times the number of hours he worked on the case." *Lindy Bros. Bldrs., Inc. of Phila. v. American R. and S. San. Corp.,* 487 F.2d 161 (3rd Cir. 1973). At the same time, the court must avoid the Charybdis of decreasing reasonable fees because the attorneys conducted the litigation more as an act pro bono publico than as an effort at securing a large monetary return. *Cf. Sims v. Amos,* 340 F.Supp. 691 (M.D. Ala.N.D. 1972). The rationale of awarding reasonable attorneys fees, after all, springs from the need for placing the legal defense of certain constitutional principles and some congressional policies on an equal footing with the protection of private interests. *Cf. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 402 (1971); *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400

(1968); *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1008 (9th Cir. 1972). See generally Note, Allowance of Attorneys' Fees in Civil Rights Litigation, 7 Colum. J.L. and Soc.Prob. 381 (1971).

The Ninth Circuit, in *Brandenberger v. Thompson*, ... F.2d ..... (9th Cir. March 25, 1974), suggested that district courts might consider the evidentiary factors listed in two cases from other circuits in determining reasonable attorneys' fees.

One case, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (concerning attorneys' fees in a Title VII action), lists twelve factors: the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal service properly; the preclusion of other employment due to acceptance of the case; the customary fee; the contingent or fixed nature of the fee; the time limitations imposed by the client or the case; the amount involved and the results obtained; the experience, reputation, and ability of the attorneys; the "undesirability" of the case; the nature of the professional relationship with the client; and awards in similar cases. The Fifth Circuit's list does not offer a useful catalogue of factors which a district court might consider in setting reasonable attorneys' fees. Of course, a district court might not find it possible to consider all, or most of, the factors in any one case. For example, this court notes that the novelty of the legal issues in this litigation makes it impossible to rely on the history of attorneys' fees awards in other cases. Also, the Fifth Circuit's opin-

ion does not indicate how a district court is to use the list, how a court is to attach a relative weight to the different factors in determining an award.

The other case, *Lindy Bros. Bldrs., Inc. of Phila. v. American R. and S. San. Corp.*, 487 F.2d 161 (3rd Cir. 1973) (concerning attorneys' fees in an antitrust action), suggests, *inter alia*, that a district court first determine fees in terms of actual hours worked and normal billing rates and, then, modify this sum in light of the contingent nature of success and of the quality of the attorneys' work. The Third Circuit's approach does present a procedure for ordering the examination of factors. It thereby complements the discussion offered in *Johnson*. But, the approach might present problems in specific cases. The variable factors—the contingent nature of success and the quality of the attorneys' work—oftentimes will be interrelated. For example, an increase in the attorneys' fees because the chances of success (and for fees) at the beginning of litigation appeared slight is implicitly if not explicitly an increase due to the high caliber of the attorneys' representation. Thus, consideration of different factors, without recognition of their overlap, might unintentionally lead to an unnecessary inflation of the attorneys' fees award.

This court, following the suggestion of the Ninth Circuit, intends to consider many of the factors listed in *Johnson* within a modified version of the framework offered in *Lindy Bros.* Specifically, the court will consider: the amount of time devoted by the attorneys to the litigation; the value of the time in

light of billing rates and of the attorneys' experience, reputation, and ability; and the attorneys' performance, given the novelty and the complexity of the legal issues in the litigation. This consideration will be grounded upon the court's opportunity to view the attorneys' work during the course of litigation and upon the information provided by the parties in their numerous briefs and affidavits. Fortunately, the court has access to the detailed, factual information necessary to reach an informed decision on the issue. *Cf. Lindy Bros. Bldrs., Inc. of Phila. v. American R. and S. San. Corp., supra* at 169.

The Time Devoted to the Litigation

Plaintiffs' attorneys, by affidavits, have itemized over 750 hours of working time spent on this litigation. This itemization does not include time spent either by Anthony Amsterdam, Professor of Law at Stanford Law School, or by a law student and a law clerk who researched various legal issues and assisted in the factual investigation.[1]

Defendants do not challenge the accuracy of the time records submitted by plaintiffs' attorneys but do contend that the attorneys spent an unreasonable number of hours on the case.

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[1]The attorneys' decision to not seek compensation for certain individual's hours, whatever their motivation, does not lessen their burden of establishing the reasonableness of the number of hours for which they do seek compensation. Their decision may have the effect of lightening defendants' liability, but it does not eliminate the need for close court scrutiny of their hours. On the contrary, the court now must determine the reasonableness of the hours in light of the fact that the attorneys did not construct their case solely within the hours for which they claim compensation. See discussion infra.

Defendants complain about the amount of time devoted to specific projects, such as the formulation of the complaint, about the use of attorneys for factual investigations and at depositions, and about the appearance of more than one attorney at court hearings and conferences. Clearly, attorneys should not be compensated for unnecessary work. See Canon 2 of the Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 2-106. Attorneys should attempt to minimize duplication of their efforts. See, *e.g.*, *Pacific Coast Agric. Export Ass'n v. Sunkist Growers, Inc.*, 1973 Trade Case, §§ 74,523, at 94,344 (N.D.Cal. 1973); *Bowl America Inc. v. Fair Lanes, Inc.*, 299 F.Supp. 1080, 1100 (D. Md. 1969); *Advance Business Systems and Supply Co. v. SCM Corp.*, 287 F.Supp. 143, 161 (D.Md. 1968). This court, however, finds that a careful review of the time records provides no ground for exclusion of any of the attorneys' time in calculating reasonable attorneys' fees. The facts of the case, the legal issues involved in its resolution, and arguments advanced by defendants required the number of hours of time which plaintiffs' attorneys expended.[2] This conclusion receives indirect support from the simple fact that plaintiffs' attorneys, who had no assurance that attorneys' fees would eventually be granted, had incen-

[2]The large number of hours expended by plaintiffs' attorneys was necessitated not only by their claims but also from a need to counter the defendants' numerous affirmative defenses to the complaint and various motions. The court does not base its calculations of a fees award on the assumption that defendants acted in bad faith or with dubious motives. Rather, the court simply notes that the strategy adopted by defendants added hours to plaintiffs' work.

tive to minimize rather than maximize the amount of time spent on the case. Their work on this case necessarily reduced their opportunity for work on other legal matter for which fees were guaranteed.

Defendants also contend that the attorney time devoted to the question of the propriety of awarding attorneys' fees should not be counted in setting the award. This contention does not square with federal court decisions which make no distinction, in calculating fees, between attorney hours spent on the merits and on the issue of counsel fees. *E.g., Miller v. Amusement Enterprises, Inc.*, 476 F.2d 534, 539 (5th Cir. 1970). The contention, if accepted, would allow parties to dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees.

Defendants additionally argue that the attorney time expended on plaintiffs' motion for a preliminary injunction should be excluded from the fees calculation. This motion, which was made after a declaratory judgment had been entered and the issue of attorneys' fees had been resolved, evidently was triggered by plaintiffs' fear that a police search of the Stanford Hospital evidenced defendants' intention to violate the spirit if not the letter of the court's judgment. The motion was denied by minute order—but only after defendant Bergna represented to the court that defendants would not engage in searches of the premises of newspapers. The minute order, it should be noted, referred to this representation.

Some federal court decisions reason that hours spent on the litigation of unsuccessful claims should be

deducted from the number of hours upon which an attorneys' fee award is computed. See *Bowl America Inc. v. Fair Lanes, Inc.*, 299 F.Supp. 1080, 1100 (D. Md. 1969); *Osborn v. Sinclair Refining Co.*, 207 F. Supp. 856, 864 (D.Md. 1962), rev'd and remanded on other grounds, 324 F.2d 566 (4th Cir. 1963). However, several recent decisions, adopting a different tack, deny fees for clearly meritless claims but grant fees for legal work reasonably calculated to advance their clients interests. These decisions acknowledge that courts should not require attorneys (often working in new or changing areas of the law) to divine the exact parameters of the courts' willingness to grant relief. See, *e.g.*, *Trans World Airlines v. Hughes*, 312 F.Supp. 478 (S.D.N.Y. 1970), aff'd with respect to fee award, 449 F.2d 51 (2nd Cir. 1971), rev'd on other grounds, 409 U.S. 363 (1973). One Seventh Circuit panel, for example, allowed attorneys' fees for legal services which appeared unnecessary in hindsight but clearly were not "manufactured." *Locklin v. Day-Glo Color Corporation*, 429 F.2d 873, 879 (7th Cir. 1970) (concerning fees for antitrust counterclaims).

Plaintiffs' attorneys obviously were not manufacturing legal services in constructing their preliminary injunction motion. They did not secure the full, injunctive relief which they originally requested, but they did obtain a significant concession from defendants as a result of their motion. In the process, they substantially advanced their clients interests. The court finds that the attorney time spent on this motion (approximately 50 hours) should be counted in determining a proper award.

The Value of the Attorneys' Services

Plaintiffs' attorneys, by affidavit, provide information concerning their individual billing rates for fixed-fee services. The attorneys bill their clients at rates which range from $50 an hour to $65.00 an hour.

This court does not accept the attorneys' usual billing rates as definitively fixing their billing rates for this litigation. This reluctance follows from the simple fact that attorneys may be leaving the area of their professional expertise in taking on pro bono public litigation and that, as a result, their billing rates should reflect this fact. As an example, large-firm attorneys who draw $65 an hour for their specialized knowledge of securities regulation should not earn the same figure for § 1983 litigation, unless they have an equivalent type of specialized knowledge of civil rights litigation. *Cf. Johnson v. Georgia Highway Express, Inc., supra* at 717-720; *Lindy Bros. Bldrs., Inc. of Phila. v. American R. and S. San. Corp., supra* at 167.

In the instant case, plaintiffs' attorneys charge at rates which, in this court's experience, compare favorably with the rates charged by other attorneys in this area for work involving complex questions of fact and law. Also, these rates reflect the attorneys' expertise: each of plaintiffs' attorneys has had considerable experience with civil rights litigation, and their hourly rates fairly reflect their experience.

Defendants Bergna and Brown, undoubtedly recognizing the excellent academic and professional backgrounds of plaintiffs' attorneys, concede that use of

the billing rate of $50 an hour in calculating reasonable attorneys' fees would be appropriate. This figure is only $1.70 an hour less than the average hourly rate which plaintiffs' attorneys recommend to the court.

In light of these facts, the court finds $50 an hour to be an appropriate average hourly rate for use in calculating an award of reasonable attorneys' fees.

Attorneys' Performance

1. The Contingent Nature of Success

Plaintiffs' attorneys argue that they assumed this case on a contingent fee basis. They contend that any attorneys' fees award, initially computed on the basis of number of work hours times the average hourly billing rate, must be increased to reflect the contingent nature of their recovering any award.

Federal court decisions generally reason that the amount of any award of attorneys' fees should reflect any contingencies which stood between the attorneys and their deserved fee. *E.g., Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974); *Lindy Bros. Bldrs., Inc. of Phila. v. American R. and S. San. Corp.*, 487 F.2d 161, 168 (3rd Cir. 1973); *Freeman v. Ryan*, 408 F.2d 1204, 1206 (D.C. Cir. 1969); *State of Illinois v. Harper and How Publishers, Inc.*, 55 F.R.D. 221 (N.D. Ill. 1972). These decisions parallel the American Bar Association's determination that attorneys deserve higher compensation for contingent than for fixed-fee work. *Cf.* Canon 2 of the Code of Professional Responsibility of

the American Bar Association, Disciplinary Rule 2-106(B)-(8)(1969).

For the attorneys' standpoint, the contingent fee insures that counsel are compensated not only for their successful efforts but also for unsuccessful litigation. Its use allows attorneys—including attorneys who could not otherwise absorb the costs of lost cases—to take the financial gamble of representing penurious clients, since, over the long run, substantial fees awards in successful cases will provide full and fair compensation for all legal services rendered to all clients. From the public's standpoint, the contingent fee helps equalize the access of rich, middle-class, and poor individuals to the courts by making attorney decisions concerning representation turn on an action's merits rather than on the size of a client's income. Courts' application of the doctrine in the aid of "private attorneys general" helps attract attorneys to the enforcement of important constitutional principles and significant congressional policies which might otherwise go unrepresented. Comment, Court Awarded Attorney's Fees and Equal Access to the Courts, 122 U.Pa.L.Rev. 636, 650-652, 708-711 (1974).

Federal courts' failure to make contingency calculations in determining fees awards, in contrast, would discourage many attorneys from accepting pro bono publico cases by presenting them with the financially unacceptable "risk of wasting hours of work, overhead and expenses" over a course of successful and unsuccessful civil actions. *Angoff v. Goldfine,* 270 F.2d 185, 189 (1st Cir. 1959).

Of course, the contingent fee doctrine has its genesis in the type of litigation in which the victorious plaintiff collects monetary relief from his adversary. The attorney accepts a case on the promise that he will share in whatever monies the plaintiff secures. The size of his share principally depends on the strength of the case: usually the stronger the case the smaller the attorney's share. The genesis of the doctrine does not preclude its use in the type of litigation in which the plaintiff obtains equitable but not monetary relief and the court retains the authority to order defendants to pay for the value of plaintiff's legal services. The doctrine, after all, does not concern the source of payment for legal services, but rather the size of the payment. The doctrine simply suggests that the contingent nature of compensation be considered in assessing the reasonableness of any fee.

Plaintiffs' attorneys correctly label this action as justifying the application of the contingent fee doctrine: at the beginning of the litigation, they could have expected an award of attorneys' fees only if this court ruled in plaintiffs' favor on the merits, only if the court ruled an award of fees appropriate, and only if the Ninth Circuit, and perhaps the Supreme Court, affirmed these determinations. Plaintiffs attorneys conducted the litigation in the face of these contingencies, expending a significant number of attorneys' hours and absorbing the necessary costs of the case without any hope of certain payment.

Admittedly, the attorneys were guaranteed payment by their clients for some of the hours which they

worked. The attorneys accepted the case only after The Stanford Daily agreed to pay $5,000 plus whatever funds which they could raise from interested third parties. In the end, the attorneys received $8,500 from their clients. These payments, of course, were not dependent on the vagaries of the litigation. However, the attorneys clearly were not guaranteed payment for most of the hours which they expended. At the beginning of the litigation, they undoubtedly realized that full payment for their services depended on the unforeseeable turns of the litigation process working in their clients' favor. In short, the fact that a fraction of their fees were guaranteed should not obscure the fact that the remainder was contingent on their success.[8]

Clearly, this court must increase the fees award obtained by multiplying the number of work hours by the average billing rate to reflect the fact that the attorneys' compensation, at least in part, was contingent in nature.

2. The Attorneys' Work

Plaintiffs maintained this civil action in an attempt at securing "the vindication of important constitutional rights." *The Stanford Daily v. Zurcher,* ..... F.Supp. ..... (N.D.Cal. 1973). Their attempt neces-

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[8]This court assumes that plaintiffs' attorneys did not expect their clients to finance most of, let alone all of, their efforts. The facts of the case warrant this assumption. However, it should be noted that plaintiffs' attorneys admit that they did not expect o spend the large number of hours of work which the litigation eventually required when they accepted the case. Thus, hindsight may make the litigation take on a contingent flavor which is partially unjustified.

sarily entailed their attorneys' construction of complex, and convincing, legal arguments which would justify the extrapolation of traditional Fourth Amendment standards to a novel fact situation. They could not rely solely on the "very few cases [which] discuss Fourth Amendment protection of third parties"; they could not cite to "any case which discusses the problem of when law enforcement agencies must use a subpoena duces tecum rather than a search warrant." *The Stanford Daily v. Zurcher,* 353 F. Supp. 124, 127 (N.D.Cal. 1972). Rather, they faced the task of breaking fresh ground in securing a novel application of an old constitutional principle.

The novelty of the issues in a case does not automatically increase the number of hours of work which attorneys must expend. "An area of the law which is barren of precedent may eliminate hours of research and preparation otherwise needed. It may also necessitate a more time-consuming search for analogous authority." *United States v. Gray,* 319 F.Supp. 871, 873 n.2 (D.R.I. 1970). But, novelty often does transform the practice of law into "an art in which success depends as much as in any other art on the application of imagination—and sometimes inspiration—to the subject matter." *Woodbury v. Andrew Jergens Co.,* 37 F.2d 749, 750 (S.D.N.Y. 1930), quoted with approval, *Sampsell v. Monell,* 162 F.2d 4, 6-7 (9th Cir. 1947). This case, in fact, posed this type of challenge.

Plaintiffs' attorneys reacted to the challenge in an admirable fashion: their presentation of issues, both in written papers and in oral argument was good;

their illumination of the controlling constitutional principles was excellent; their advocacy of their clients' interests was thoughtful. Additionally, the attorneys reacted well to defendants' maneuvers, offering legal research of high quality in response to defendants' answer and motions.

This court, in short, notes that plaintiffs' attorneys provided excellent legal services and that they, for the most part, successfully advanced their clients' interests. These facts weigh in favor of increasing the fees award. See George D. Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards,* 69 Harv.L.Rev. 658, 660-661 (1956). However, another fact suggests restraint in increasing the award.

Plaintiffs' attorneys, as noted *supra,* do not seek compensation either for the time of Professor Anthony Amsterdam or for the work of a law student and a law clerk. The attorneys estimate, in an affidavit, that Professor Amsterdam expended not less than 75 hours on the litigation. The court notes that his participation in oral argument greatly facilitated the court's resolution of some of the complex legal issues of the case. Also, the court assumes that the high quality of plaintiffs' written work can be traced, at least in small part, to his hours on the case. The attorneys state that a law student and a law clerk engaged in substantial work on the litigation and note that one law student researched the crucial Fourth Amendment issues which controlled the course of the litigation. Again, this court assumes that the student

and the clerk helped the attorneys assemble their excellent case.

This court cannot adjust the fees award to reflect the quality of the attorneys' work without taking into account the fact that the award will not go to some of the individuals who performed significant legal services and who may be partially responsible for the general excellence of the attorneys' work. Rather, the court must adjust the award so that the attorneys who actually will share in the award will be compensated, as near as possible, only for their contribution to the litigation. This approach attempts to avoid any unreasonable enrichment of the attorneys who ask the court for fees.

With the caveat in mind, the court finds that the attorneys' work, and the results which they obtained through their work, merit an increase in the base figure upon which a reasonable attorneys' fees award is computed.

Conclusion

The court finds that plaintiffs' attorneys devoted approximately 750 hours to the prosecution of this action on behalf of their clients and that this figure does not reflect the time expended by Professor Anthony Amsterdam and by certain other individuals. The court finds no reason to exclude any of the time in determining a reasonable fees award.

The court also find that $50.00 an hour is an appropriate average billing rate for use in determining a reasonable award.

The court also finds that the contingent nature of compensation, the quality of the attorneys' work, and the results obtained by the litigation warrant increasing the base fees figure (hours worked times average billing rate) in determining the award.

Accordingly, plaintiffs' attorneys are awarded fees in the sum of $47,500.

So ordered.

Dated: July 17, 1974

/s/ Robert F. Peckham
United States District Judge

Appendix F

United States District Court
Northern District of California

No. C-71 912 RFP (SJ)

The Stanford Daily, Felicity A. Barringer, Fred Mann, Edward H. Kohn, Richard Lee Greathouse, Robert Litterman, Hall Daily and Steven G. Ungar,

Plaintiffs,

vs.

James Zurcher, individually and as Chief of Police of the City of Palo Alto, County of Santa Clara, State of California, James Bonander, Paul Deisinger, Donald Martin and Richard Peardon, all individually and as Police Officers of the City of Palo Alto, County of Santa Clara, State of California, Louis P. Bergna, individually and as District Attorney for the County of Santa Clara, State of California, Craig Brown, individually and as Deputy District Attorney for the County of Santa Clara, State of California,

Defendants.

[Filed Jul. 23, 1974]

JUDGMENT

This cause came on to be heard on motion of the plaintiffs for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having read the pleadings and records on file

and considered the affidavits of plaintiffs in support of the motion and the affidavits of the defendants in opposition thereto, and the Court having heard the argument of counsel, and due deliberation having been had thereon, and the Court having prepared and filed a Memorandum and Order on October 5, 1972, granting plaintiffs' motion for summary judgment, and the Court having read the pleadings and records on file and considered the affidavits in support of plaintiffs' motion for an award of attorneys fees, and the Court having heard the argument of counsel, and due deliberation having been had thereon, and the Court having prepared and filed a Memorandum and Order on August 10, 1973, granting plaintiffs' motion for an award of attorneys fees, and the Court having fixed the amount of $47,500 as reasonable attorneys fees on July 17, 1974,

It Is Hereby Ordered, Adjudged and Decreed that:

1. There is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law against each and all of the defendants (other than defendant J. Barton Phelps who was dismissed with prejudice on December 15, 1972) in conformity with the Memorandum and Order granting declaratory relief previously filed by the Court herein;

2. Plaintiffs recover from defendants, and each of them, attorneys fees in the amount of $47,500.00, with interest thereon at the rate of seven percent (7%) per annum as provided by law, and that plaintiffs recover their other costs of suit;

3. This judgment shall be without prejudice to the right of plaintiffs to seek further relief based upon the declaratory judgment heretofore rendered in this cause whenever necessary or proper or the right of plaintiffs to seek further award for such attorneys fees as are incurred upon any appeal herein.

Dated: July 23, 1974.

/s/ Robert F. Peckham
United States District Judge

Appendix G

United States District Court
For the Northern District of California
San Jose, California

No. C-71-912-RFP(SJ)

The Stanford Daily, et al., Plaintiffs,

vs.

James Zurcher, et al., Defendants.

[Filed Jul. 25, 1974]

NOTICE OF ENTRY OF JUDGMENT

To:

Anthony G. Amsterdam
Stanford University Law School
Palo Alto, California

Howard, Prim, Smith, Rice & Downs
650 California St.,
San Francisco, 94108

Peter G. Stone
605 Castro Street,
Mt. View, Ca. 94040

William M. Siegel
Shelby Brown Jr.
County Administration Building
70 West Harding Street
San Jose, Ca.

You Are Hereby Notified That on July 25th, 1974 Judgment Was Entered in Favor of Plaintiff in the Above-Entitled Case.

F. R. Pettigrew, Clerk
By: John B. Pomeroy Jr.
Deputy Clerk-in-charge

San Jose, California
Dated: July 25th, 1974